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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, *et al.*,
Petitioners,

v.

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

When a court of appeals has rendered a decision on the law of a state within its circuit and exactly the same question of state law is later presented to another court of appeals, what amount of deference is due the prior decision of the "home" circuit?

In particular, did the United States Court of Appeals for the District of Columbia Circuit err when it refused to defer to a prior decision of the Eighth Circuit (applying Missouri law to an identical set of facts) that under Missouri law "response costs" incurred for government-ordered environmental remediation are not "damages" covered by general liability insurance policies, even though the D.C. Circuit cited no existing Missouri precedent that the Eighth Circuit had overlooked, nor any superseding enactment by the Missouri legislature, nor any subsequent ruling by the Missouri Supreme Court, nor any other Missouri appellate court addressing the issue?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	14
APPENDIX	Separately bound

TABLE OF AUTHORITIES

CASES	Page
Abex Corp. v. Maryland Casualty Co., 790 F.2d 119 (D.C. Cir. 1986)	7, 10
Aetna Casualty & Surety Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955)	3, 5
Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985)	13
C.C. Grisham v. Commercial Union Ins. Co., No. 89-1481, 1991 WL 257430 (8th Cir. December 9, 1991)	8
Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co., 842 F.2d 977 (8th Cir. 1988) (*en banc*), *cert. denied*, 488 U.S. 821 (1988)	*passim*
Cooper Industries, Inc. v. American Mutual Liability Ins. Co., No. 864-00284 (Mo. Cir. Ct. St. Louis Sept. 8, 1989)	7
Desrochers v. New York Casualty Co., 99 N.H. 129, 106 A.2d 196 (1954)	3
Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938)	11, 12
Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 440 U.S. 908 (1979)	*passim*
Granberry v. Greer, 481 U.S. 129 (1987)	13
Hanna v. Plumer, 380 U.S. 460 (1965)	11
Huddleston v. Dwyer, 322 U.S. 232 (1944)	13
In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution, 712 F. Supp. 994 (D. Mass. 1989)	4
Independent Petrochemical Corp. v. Aetna Casualty & Surety Co., 944 F.2d 940 (D.C. Cir. 1991)	2, 6, 7, 10
Jones Truck Lines, Inc. v. Transport Ins. Co., No. 72650 (Mo. July 13, 1990)	7
Jones Truck Lines, Inc. v. Transport Ins. Co., 29 Env't. Rep. Cases (BNA) 1605 (E.D. Pa. 1989)	7, 12
MacGregor v. State Mutual Life Assurance Co., 315 U.S. 280 (1942)	13

TABLE OF AUTHORITIES—Continued

	Page
Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988)	5, 6
Parker Solvents Co. v. Royal Ins. Cos. of America, No. 90-2224, 1991 WL 257413 (8th Cir. December 9, 1991)	8
Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)	13
Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985)	13
Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938)	13
Salve Regina College v. Russell, —— U.S. ——, 111 S.Ct. 1217 (1991)	12, 13
United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987)	4
STATUTES	
28 U.S.C. § 1254	2
28 U.S.C. § 1332	4
28 U.S.C. § 1391	4
28 U.S.C. § 1652	2
42 U.S.C. § 9607(a)	2, 3, 4
Mo. Stat. Ann. § 477.004	7
RULES OF COURT	
Sup. Ct. R. 10.1(a)	9
Sup. Ct. R. 10.1(c)	8-9
OTHER AUTHORITIES	
Edna Hanovice, Note, *Ascertaining Undefined State Law Under the* Erie *Doctrine:* Factors Etc., Inc. v. Pro Arts, Inc., 62 B.U. L. Rev. 817 (1982)	9-10
Craig A. Hoover, Note, *Deference to Federal Circuit Court Interpretations of Unsettled State Law:* Factors Etc., Inc. v. Pro Arts, Inc., 1982 Duke L.J. 704	9-10

TABLE OF AUTHORITIES—Continued

	Page
William H. Jestings, Note, *Recognizing the Need for a Uniform System of Federal Comity in Diversity Decisions*, 16 Suffolk U. L. Rev. 787 (1982)	9-10
D. Neil Radey, Note, *Circuit Court of Appeals Must Accord Conclusive Deference to Another Circuit's Determination of the Law of a State Within the Other Circuit:* Factors Etc., Inc. v. Pro Arts, Inc., 67 Cornell L. Rev. 415 (1982)	9-10
Elizabeth Schneider, Note, *Deference to One Circuit Court's Decision by Another Circuit:* Factors Etc., Inc. v. Pro Arts, Inc., 17 New Eng. L. Rev. 1061 (1982)	
Charles A. Wright, *The Law of Federal Courts* (4th ed. 1983)	9-10
II Almanac of the Federal Judiciary (1989)	6

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PETITION FOR WRIT OF CERTIORARI

Petitioners, eighteen insurers,[1] petition for a writ of certiorari and ask this Court to reverse the judgment below.

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[1] Petitioners here are as follows: The Continental Insurance Company, First State Insurance Company, Hartford Accident & Indemnity Company, Aetna Casualty & Surety Company, American Employers' Insurance Company, Employers Commercial Union Insurance Company, The Travelers Indemnity Company, American Home Assurance Company, Insurance Company of North America, The Insurance Company of the State of Pennsylvania, Lexington Insurance Company, Harbor Insurance Company, American Re-Insurance Company, Unigard Security Insurance Company, Continental Casualty Company, North Star Reinsurance Corporation, Stonewall Insurance Company, and Certain Underwriters at Lloyd's, London. Respondents are Independent Petrochemical Corp., The Charter Company, Charter Oil Company, the State of Missouri, and the United States.

Pursuant to Rule 29.1 of the Rules of this Court, a list naming parent companies and subsidiaries (except wholly-owned subsidiaries) of the corporate petitioners is set forth as Appendix G herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported as *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, 944 F.2d 940 (D.C. Cir. 1991), and is Appendix A to this Petition. The district court's unreported opinion is Appendix B. An earlier opinion addressing other issues in the litigation below is reported at 654 F. Supp. 1334 (D.D.C. 1986).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 13, 1991 (Appendix A). On November 5, 1991, the court of appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* (Appendix D). This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652 (1988), provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The pertinent section of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a), is set forth in Appendix E herein.

STATEMENT OF THE CASE

1. From 1970 to 1972, the Northeastern Pharmaceutical and Chemical Co. ("NEPACCO") manufactured chemicals in Missouri at a plant owned by Syntex Agribusiness, Inc. ("Syntex"). The manufacturing process produced waste which contained dioxin. NEPACCO asked

Respondent Independent Petrochemical Corp. ("IPC"), a wholesale supplier of bulk chemicals, to help NEPACCO arrange for the disposal of its waste. IPC then contacted waste oil handler Russell Bliss who accepted NEPACCO's waste for disposal and, after mixing it with waste oil, sprayed it as a dust suppressant at various locations in Missouri. Dioxin contamination resulted.

2. Both NEPACCO and IPC had purchased Comprehensive General Liability ("CGL") insurance policies which obligated the insurers to:

> pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an occurrence . . . .

Under the leading case of *Aetna Casualty & Surety Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955), the phrase "as damages" in the insuring clause of CGL policies was understood to limit coverage to "legal claim[s] for damages" against the insured. The cost of "complying with an injunctive decree," such as a government order requiring the removal of waste from another's property (a cost which could far exceed the actual property value), was not within the grant of coverage. *Id.*, *citing Desrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196 (1954).

3. Congress subsequently passed the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.* Under CERCLA § 9607(a), persons who generate or dispose of hazardous substances are liable for "response costs," *i.e.*, the costs of the removal or remediation of contamination (§ 9607(a)(4)(A) and (B)). It has been the consistent position of the United States and the courts that, in contrast to an action at law for damages, a suit for CERCLA response costs is "plainly . . . equitable in nature," and therefore a defendant has no right to a jury trial. Brief

for the United States in Opposition to Petition for Writ of Certiorari at 22 n.18, *Northeastern Pharmaceutical and Chem. Co. v. United States*, No. 87-63 (U.S. Sup. Ct. 1987); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

A separate provision of CERCLA, § 9607(a)(4)(c), provides that those who generate or dispose of hazardous substances may also be liable for "damages for injury to . . . natural resources . . . ." In CERCLA actions for natural resources damages, unlike equitable claims for response costs, the parties are entitled to a jury trial. *In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 712 F. Supp. 994, 1001 (D. Mass. 1989).

4. Acting pursuant to CERCLA, the U.S. Environmental Protection Agency ("EPA") and the State of Missouri implemented a plan to remediate dioxin contamination at the Missouri sites. IPC's potential joint liability for the remediation is expected to be at least $96,000,000. The EPA and the State of Missouri each filed a CERCLA action against NEPACCO and IPC in federal district court in Missouri to recover their response costs; damages for injury to natural resources were not sought.

5. In November 1983, IPC brought an action in the United States District Court for the District of Columbia seeking a declaration of entitlement to insurance coverage for, *inter alia*, CERCLA response costs incurred in connection with the Missouri dioxin contamination. The sole basis for jurisdiction was diversity (28 U.S.C. § 1332). None of the parties has a principal place of business or is incorporated in the District of Columbia. Venue was proper because the District of Columbia's insurance statutes permit service of process on the defendant insurers (28 U.S.C. § 1391(a) and (c)).

While IPC's coverage suit was pending in the District of Columbia, NEPACCO's insurer filed an action in fed-

eral district court in Missouri seeking a declaratory judgment that insurance did not cover CERCLA response costs incurred in connection with the Missouri dioxin contamination. Thus, both the *IPC* and the *NEPACCO* coverage actions involved the same dioxin contamination in Missouri and the same insurance policy language.

6. The district court in *NEPACCO* granted summary judgment for the insurer. On appeal, the United States Court of Appeals for the Eighth Circuit, *en banc*, affirmed, holding that under Missouri law the obligation to cover "damages" created by a CGL insurance policy does not extend to a policyholder's liability for CERCLA response costs. *See Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co.*, 842 F.2d 977, 985-86 (8th Cir. 1988) (*en banc*), *cert. denied*, 488 U.S. 821 (1988):

> In the insurance context . . . the term "damages" is not ambiguous, and the plain meaning of the term "damages" as used in the insurance context refers to legal damages and does not include equitable monetary relief. *See Maryland Casualty Co. v. Armco, Inc.*, [822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988)] . . . . "The obligation of the insurer to pay is limited to 'damages,' a word which has an accepted technical meaning in law." *Hanna*, 224 F.2d at 503. Although not defined in the CGL policies, "[t]he word 'damages' is not ambiguous in the insurance context. Black letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts." *Maryland Casualty Co. v. Armco, Inc.*, (citations omitted).

The *NEPACCO* court additionally found its construction of "damages" to be consistent with the distinction drawn in insurance law between money damages and injunctive relief, as well as with the statutory scheme of CERCLA which differentiates between damages, a legal remedy, and response costs, which are equitable in nature.

Both participating judges from Missouri joined the *en banc* majority opinion. Circuit Judge McMillian, who wrote the opinion, had more than 20 years of service as a Missouri state trial and appellate judge before joining the Eighth Circuit. Circuit Judge Bowman is a former dean of the University of Missouri Law School. II Almanac of the Federal Judiciary (1989).

Circuit Judge Heaney, writing for the three dissenting judges, argued that the word "damages" should be given a construction that would encompass CERCLA response costs (842 F.2d at 988). The dissenters also sought to distinguish the coverage cases on which the majority relied, *see e.g., Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988). This Court denied certiorari (488 U.S. 821 (1988)).

7. In the *IPC* coverage action in the District of Columbia, the same legal issue—whether as a matter of Missouri law response costs are "damages" under CGL insurance policies—was briefed to the court. The district judge deferred to the *en banc* decision of the Eighth Circuit in *NEPACCO*, granting the insurers' motion for partial summary judgment. *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, No. 83-3347 (D.D.C. Sept. 7, 1988) (Appendix B at 199a): ("The court finds no basis to conclude that the *en banc* Eighth Circuit has ignored clear signals from the courts of Missouri, and accordingly, will follow the *NEPACCO* precedent here . . . .").

8. IPC appealed and the D.C. Circuit reversed, adopting the reasoning of the *NEPACCO* dissent. *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, 944 F.2d 940 (D.C. Cir. 1991) ("*IPC*") (Appendix A herein). The D.C. Circuit acknowledged that there is a principle of deference to a circuit that has previously decided a question of the law of a state within its boundaries (the "home" circuit), citing *Factors Etc., Inc. v. Pro Arts, Inc.*,

652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982), and its own decision in *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119 (D.C. Cir. 1986). The D.C. Circuit refused to defer to *NEPACCO*, however, because in the panel's view, while recognizing and citing the applicable Missouri law cases, the Eighth Circuit "fail[ed] to apply [them]." (944 F.2d at 945, Appendix A at 10a).

In reaching that conclusion, and in contradiction of the standard of deference that had been articulated by the Second Circuit in *Factors*, the D.C. Circuit cited no Missouri precedent that the Eighth Circuit had overlooked, nor any superseding enactment by the Missouri legislature, nor any subsequent ruling by the Missouri Supreme Court,[2] nor, for that matter, any subsequent ruling by any Missouri appellate court.[3] In the final analysis, the *IPC* panel substituted its own reasoning for that of the Eighth Circuit and embraced the *NEPACCO* dissent. The D.C. Circuit denied a petition for rehearing and suggestion for rehearing *en banc*.

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[2] In *Jones Truck Lines, Inc. v. Transport Ins. Co.*, No. 72650 (Mo. July 13, 1990), the Missouri Supreme Court refused an attempt by the United States Court of Appeals for the Third Circuit to certify the "as damages" issue to the Missouri Supreme Court for its decision. In its order, the court declared that the certification statute passed by the Missouri legislature in 1989, Mo. Stat. Ann. § 477.004 (Vernon Supp. 1989), violated the Missouri constitution. The case settled before the Third Circuit was required to decide the proper standard of deference to *NEPACCO*. *See Jones Truck Lines, Inc. v. Transport Ins. Co.*, 29 Env't. Rep. Cases (BNA) 1605 (E.D. Pa. 1989).

[3] Having earlier recognized the unreliability of isolated trial court decisions (one trial court decision "does not a 'clear signal' make," *Abex*, 790 F.2d at 126 n.33), in *IPC* the D.C. Circuit took just the opposite tack. The court found comfort in an unreported opinion of a Missouri trial court that some—but not all—response costs should be covered as "damages" under Missouri law. *IPC*, 944 F.2d at 945-46 (Appendix A at 10a), *citing Cooper Industries, Inc. v. American Mutual Liability Ins. Co.*, No. 864-00284 (Mo. Cir. Ct. St. Louis Sept. 8, 1989) (Appendix F herein).

9. Following the D.C. Circuit decision, the Eighth Circuit declined to alter *NEPACCO* and reached a similar conclusion with regard to Arkansas law, reasoning that there is no material difference between Arkansas and Missouri law. *C.C. Grisham v. Commercial Union Ins. Co.*, No. 89-1481, 1991 WL 257430 at p.3 (8th Cir. December 9, 1991); *Parker Solvents Co. v. Royal Ins. Cos. of America*, No. 90-2224, 1991 WL 257413 at p.1 (8th Cir. December 9, 1991). In *Parker Solvents*, the Eighth Circuit acknowledged disagreements among the circuits on this state law issue, which it intimated were more a reflection of differing views toward the public policy implications of insurance coverage for CERCLA response-cost liability (1991 WL 257413 at p.1) than a disagreement about state law principles:

> [s]tandard form CGL insurance policies use virtually the same language around the country, and general principles of insurance law do not vary greatly from state to state. The real issue, of course, is whether the insurance industry should be compelled to help finance an immense environmental cleanup obligation that was not anticipated, by insureds or insurers, at the time these policies were written. On this difficult issue, which transcends state boundaries and has important public policy implications, it is not surprising that judges disagree.

REASONS FOR GRANTING THE WRIT

The standard of deference a court of appeals owes to a "home" circuit's interpretation of state law is an important question on which the D.C. and Second Circuits disagree; this case, involving an insurance coverage issue of substantial importance, presents an appropriate case for resolving that question.

The standard of deference one circuit owes to a prior decision of another, on issues of the law of a state within the latter circuit's boundaries, is an important federal question which has not been addressed by this Court. Sup.

Ct. R. 10.1(c). The D.C. Circuit's standard of deference is in direct conflict with the standard the Second Circuit has articulated. Sup. Ct. R. 10.1(a). The determination of a significant and recurring issue of state law—insurance coverage for CERCLA response-cost liability—should not hinge on the circuit in which a litigant has chosen to file its action.

1. Both courts and commentators have expressed differing views concerning the required standard of deference to a decision made by a court of appeals on the law of a state within its boundaries. Over a decade ago, in *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2nd Cir. 1981), *cert. denied*, 456 U.S. 972 (1982), the Second Circuit held that "conclusive deference should be given" to a home circuit's decision unless it had missed existing, contrary precedents or been superseded by legislative enactment or a ruling of the state's highest court (*id.* at 283 (citation omitted)):

> A federal court in another circuit would be obliged to disregard a state law holding by the pertinent court of appeals if persuaded that the holding had been superseded by a later pronouncement from state legislature or judicial sources . . . or that prior state court decisions had been inadvertently overlooked . . . . Where, as here, the pertinent court of appeals has essayed its own prediction of the course of state law on a question of first impression within that state, the federal courts of other circuits should defer to that holding, perhaps always, and at least in all situations except the rare instance when it can be said with conviction that the pertinent court of appeals has disregarded clear signals emanating from the state's highest court pointing toward a different rule.[4]

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[4] The *Factors* decision prompted a spirited academic debate concerning the merits of the rule of conclusive deference. For favorable treatment of *Factors*, see Elizabeth Schneider, Note, *Deference to One Circuit Court's Decision by Another Circuit:* Factors Etc.,

The *Factors* standard of deference is objective—unmistakable in its terms and straightforward to apply. The D.C. Circuit, however, has adopted a subjective standard of deference which allows it both to substitute its own reasoning for that of the home circuit and to take into account "signals" by courts other than the state's highest court. *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 125-26 (D.C. Cir. 1986). The *IPC* panel articulated this standard thus (944 F.2d at 945, Appendix A at 9a):

> Under *Abex*, we will not follow another circuit's decision if that court "ignored clear signals emanating from the state courts" or "*clearly misread* state law." 790 F.2d at 125-26 (emphasis in original). . . .

Applying that subjective standard, the *IPC* court rejected the *en banc* Eighth Circuit decision in *NEPACCO* by, for the most part, simply embracing the *NEPACCO* dissent. In rejecting the *en banc* Eighth Circuit's considered view of Missouri law by essentially reaching a different conclusion on the same arguments decided by that court, the D.C. Circuit rejected the strict deference standard set forth by the Second Circuit in *Factors*.

2. The Second Circuit's standard of "conclusive" deference—unless the home circuit decision has been superseded by a later pronouncement from the state's legisla-

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Inc. v. Pro Arts, Inc., 17 New Eng. L. Rev. 1061 (1982); William H. Jestings, Note, *Recognizing the Need for a Uniform System of Federal Comity in Diversity Decisions*, 16 Suffolk U. L. Rev. 787 (1982). For criticism of *Factors* see Charles A. Wright, *The Law of Federal Courts* 376-77 (4th ed. 1983); Edna Hanovice, Note, *Ascertaining Undefined State Law Under the* Erie *Doctrine:* Factors Etc., Inc. v. Pro Arts, Inc., 62 B.U. L. Rev. 817 (1982); D. Neil Radey, Note, *Circuit Court of Appeals Must Accord Conclusive Deference to Another Circuit's Determination of the Law of a State Within the Other Circuit:* Factors Etc., Inc. v. Pro Arts, Inc., 67 Cornell L. Rev. 415 (1982); Craig. A. Hoover, Note, *Deference to Federal Circuit Court Interpretations of Unsettled State Law:* Factors Etc., Inc. v. Pro Arts, Inc., 1982 Duke L.J. 704.

ture or highest court—avoids inconsistent treatment of the same state law issue in different cases, eliminates an incentive for forum-shopping, and promotes orderly development of state law. "Conclusive" deference thus promotes the twin aims of *Erie Railway Co. v. Tompkins*, 304 U.S. 64 (1938)—the "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Adherence to the state law rulings of a home circuit also promotes judicial economy by reducing disagreements within the federal judiciary about state law. "Diversity jurisdiction, especially in its post-*Erie* incarnation, should not create needless diversity in the exposition of state substantive law." *Factors*, 652 F.2d at 283. The *Factors* court expressed the benefits of its objective deference standard thus (652 F.2d at 282 (footnote omitted)):

> [T]he opportunities for federal court departure from the normal paths of state law development should be held to a minimum, for the benefit of both the orderly development of state law and fairness to those subject to state law requirements . . . . Fairness to the public is promoted by making clear that there is a single, authoritative answer to the particular state law issue, instead of leaving the matter subject to the varying interpretations of the courts of appeals for the several circuits.

Consider the unfairness created by the irreconcilable rulings of the Eighth and D.C. Circuits on whether response costs are covered "damages" under Missouri law. The petitioners are at risk for tens of millions of dollars of response costs only because IPC sued in the District of Columbia, not in Missouri. One of the petitioners, Continental Insurance Company, insured both IPC and NEPACCO. That carrier finds itself obligated to cover the CERCLA response costs of IPC, but not of NEPACCO. This inconsistency occurs even though the same insurance policy language is applied to precisely the same set of

facts, and the policies are interpreted under the law of the same state. The only reason for this contradiction is the circuit in which the plaintiff elected to bring suit.

And the potential for further inconsistency, and its adverse impact on the administration of state law in the federal court system, is even greater. In *Jones Truck Lines*, the same legal issue, under Missouri law, based on the same dioxin contamination, was in litigation in the Third Circuit (see n.2 *supra*). Had that action not settled, the Third Circuit would have had to decide what rule of deference to apply—the Second Circuit rule, the D.C. Circuit rule, or still another rule—in order to resolve the split between the Eighth and D.C. Circuits. The forum-shopping implications are clear. The result is unacceptable. As the Second Circuit stated in *Factors* (652 F.2d at 283):

> lawyers frequently have to advise clients concerning unsettled issues of law, but the exercise of diversity jurisdiction should not add to their uncertainty.

3. While finding that courts of appeals may not defer to federal district courts on interpretations of state law, in *Salve Regina College v. Russell*, —— U.S. ——, 111 S.Ct. 1217 (1991), this Court restated the very principles that support a rule of conclusive deference to the home circuit. Deference to home circuit decisions avoids the "divergent development of State law" (*id.* at 1222) that is inimical to the interests of federalism. It also avoids the "dual system of enforcement of state-created rights in which the substantive rule applied to a dispute may depend on the choice of forum." *Id.* Most importantly, deference to the home circuit promotes the "twin aims" of *Erie* quoted above. *Id.*

Here, to the contrary, two federal courts of appeals have reached opposite conclusions and thus litigants are subjected to inconsistent judgments based only on the fortuity of where the plaintiff filed suit. Such a result should be impermissible in a federal system designed to

treat similar litigants similarly and, to the extent possible, to avoid unnecessary intrusions into the development of state law.

4. Deference is also important to maintain uniformity of decisions among the federal courts of appeals in view of this Court's well-established policy of not granting certiorari to resolve state law conflicts. When one circuit disagrees with another on a significant question of federal law, this Court grants certiorari to resolve the conflict. This Court, however, has an announced policy of not granting certiorari to resolve conflicts between the circuits on issues of state law. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938). *Cf. Huddleston v. Dwyer*, 322 U.S. 232 (1944) (remanding state law question to court of appeals for reconsideration in light of conflicting state court decision).

When this Court has been presented with issues of state law, however, it has repeatedly expressed a policy of deference to the court of appeals most familiar with the state's law. *See Salve Regina College v. Russell*, 111 S.Ct. 1217, 1223 n.5 (1991) (distinguishing deference to courts of appeals from deference to district courts); *Granberry v. Greer*, 481 U.S. 129, 136 n.9 (1987) ("we defer to the Court of Appeals which is more familiar with Illinois' practice than we are"); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 n.13 (1986) ("great deference to the interpretation and application of state law by the courts of appeals"); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 224 n.10 (1985) ("we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) ("courts of appeals are better schooled in and more able to interpret the laws of their respective States . . . . The rule is not ironclad, however . . ."); *MacGregor v. State Mutual Life Assurance Co.*, 315 U.S. 280 (1942).

Only a strong policy of conclusive deference can simultaneously conserve this Court's resources, promote the policies this Court has found to be important, and avoid unseemly conflicts among the circuits on state law questions.

CONCLUSION

The D.C. Circuit erred in failing to defer to the Eighth Circuit's decision that CERCLA response costs are not "damages" under Missouri law. The D.C. Circuit's standard of deference is in conflict with the standard of deference articulated by the Second Circuit in *Factors*. Resolution of that conflict is essential to the proper administration of the federal courts and the orderly development and authoritative exposition of state law.

Petitioners respectfully pray that this Court will grant their petition and reverse the decision below.

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